

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PEDRO NAVARRO,

Plaintiff,

v.

A. WESTPHAL, VICTORIA TAPIA,
JACKIE FLUAITH, MIKE
MCCOURTIE, LT. ROBERT LONG,
JEFFERY UTTECH, ROY
GONZALEZ, SCOTT FRANKS,
EARL X. WRIGHT and BERNARD
WARNER,

Defendants.

NO: 4:16-cv-05094-MKD

REPORT AND RECOMMENDATION
TO DISMISS FIRST AMENDED
COMPLAINT

BEFORE THE COURT on Report and Recommendation is Plaintiff's First Amended Complaint, ECF No. 10. Plaintiff, a prisoner at the Coyote Ridge Corrections Center, is proceeding *pro se* and *in forma pauperis*; Defendants have not been served. Plaintiff seeks unspecified declaratory and injunctive relief as well as monetary damages.

REPORT AND RECOMMENDATION TO DISMISS FIRST AMENDED
COMPLAINT --1

1 After liberally construing the allegations in the light most favorable to
2 Plaintiff, the undersigned judicial officer recommends dismissal of the First
3 Amended Complaint for failure to state a claim upon which relief may be granted.

4 **PLAINTIFF'S ALLEGATIONS**

5 Plaintiff contends that pursuant to a DOC policy promulgated by Defendant
6 Warner (i.e., DOC policy 450.100 regarding indigent mail for offenders),
7 Defendants A. Westphal and Victoria Tapia prevented Plaintiff from mailing six
8 letters to attorneys and a legal aid organization on September 18, 2014, one letter
9 to an attorney on October 26, 2014, two letters to attorneys on November 25, 2014,
10 and one letter to his criminal appeal attorney on February 2, 2015. Plaintiff
11 challenges the policy and the failure of various Defendants to stop its enforcement
12 against him. Plaintiff asserts this “prevented [him] from relaying vital information
13 to [his] criminal appeal attorney that could of got [his] conviction reversed.”

14 A state may adopt reasonable postage stamp regulations. *See King v. Atiyeh*,
15 814 F.2d 565, 568 (9th Cir. 1987) (citations omitted), *overruled on other grounds*
16 *by Lacey v. Maricopa Cty.*, 693 F.3d 896 (9th Cir. 2012). A prisoner asserting an
17 access to court claim must show that a restriction, here a limitation on indigent
18 postage, caused him “actual injury,” i.e., “that a nonfrivolous legal claim had been
19 frustrated or was being impeded.” *Lewis v. Casey*, 518 U.S. 343, 351-53 (1996).

1 To support an access to court claim, the allegation of actual injury must be
2 specific, that is, Plaintiff must set out the claim that was “frustrated or impeded.”
3 *Christopher v. Harbury*, 536 U.S. 403, 415-16 (2002). Plaintiff must describe the
4 claim “well enough to apply the ‘nonfrivolous’ test and to show that the ‘arguable’
5 nature of the underlying claim is more than hope.” *Id.* at 416.

6 Here, Plaintiff has presented only conclusory assertions that he was
7 prevented from communicating unspecified “vital information” on three separate
8 occasions to his attorney, which he speculates might have caused his conviction to
9 be reversed. He does not share with the court what this “vital information” is or
10 how he was prevented from communicating this “vital information” to the state
11 courts in supplemental materials.

12 Plaintiff does not state the time frame of his criminal appeal or how the dates
13 of September 18, and November 26, 2014, and February 2, 2105, were crucial to
14 that appeal. Plaintiff does not allege that he was unable to contact his appellate
15 counsel by phone during that time period, or to mail information on a later date.
16 As presented, Plaintiff’s allegations are insufficient to state an access to court
17 claim upon which relief may be granted.

18 ***HECK V. HUMPHREY***

19 Even if Plaintiff could present information showing his conviction would
20 have been reversed but for the application of the indigent mail policy to his three

1 letters to appellate counsel, this would place his section 1983 claim in a different
2 category of cases. A prisoner claiming that he was injured because the denial of
3 access to courts kept him from getting his conviction overturned is precluded from
4 attacking the conviction through a § 1983 action, unless that conviction has already
5 been invalidated. *See Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). Plaintiff
6 makes no assertion that his conviction has been invalidated. Therefore, he may not
7 attack his underlying conviction in this section 1983 action.

8 Accordingly, **IT IS RECOMMENDED** the First Amended Complaint, ECF
9 No. 10, be **DISMISSED without prejudice** for failure to state a claim upon which
10 relief may be granted under 28 U.S.C. §§ 1915(e)(2) and 1915A(b)(1). In light of
11 the recent Ninth Circuit decision in *Washington v. L.A. Cty. Sheriff's Dep't*, 833
12 F.3d 1048, 1055-56 (9th Cir. 2016), the Court will not recommend that such
13 dismissal count as a “strike” pursuant to 28 U.S.C. § 1915(g).

14 **OBJECTIONS**

15 Any party may object to a magistrate judge's proposed findings,
16 recommendations or report within fourteen (14) days following service with a copy
17 thereof. Such party shall file written objections with the Clerk of the Court and
18 serve objections on all parties, specifically identifying the portions to which
19 objection is being made, and the basis therefor. Any response to the objection
20 shall be filed within fourteen (14) days after receipt of the objection. Attention is

1 directed to Fed. R. Civ. P. 6(e), which adds additional time after certain kinds of
2 service.

3 A district judge will make a de novo determination of those portions to
4 which objection is made and may accept, reject, or modify the magistrate judge's
5 determination. The judge need not conduct a new hearing or hear arguments and
6 may consider the magistrate judge's record and make an independent
7 determination thereon. The judge may, but is not required to, accept or consider
8 additional evidence, or may recommit the matter to the magistrate judge with
9 instructions. *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000); 28 U.S.C.
10 § 636(b)(1)(B) and (C), Fed. R. Civ. P. 72; LMR 4, Local Rules for the Eastern
11 District of Washington.

12 A magistrate judge's recommendation cannot be appealed to a court of
13 appeals; only the district judge's order or judgment can be appealed.

14 **IT IS SO RECOMMENDED.** The Clerk of Court is directed to enter this
15 Report and Recommendation and forward a copy to Petitioner.

16 DATED November 1, 2016.

17 s/ Mary K. Dimke
18 Mary K. Dimke
United States Magistrate Judge
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